

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FELICIANO D. MENDEZ,

Defendant and Appellant.

G057792

(Super. Ct. No. 18NF1228)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Gary M. Pohlson, Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for
Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Holly D. Wilkens and
Robin Urbanski, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

INTRODUCTION

Defendant Feliciano D. Mendez challenges his robbery conviction based on the trial court's refusal to instruct the jury with two pinpoint instructions he proposed. We conclude the trial court did not err, and therefore affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 2, 2017, Arjunpaul Parmar and Joseph Ruvalcaba were working as undercover security guards at a Target store in Anaheim, California. At about 3:00 p.m., Ruvalcaba observed defendant select a package of golf balls, lift his sweater, and conceal the golf balls in the waistband of his pants. They watched defendant walk through the store and pass the cash registers without paying for the golf balls.

After defendant exited the store, Parmar approached defendant with his hand extended, identified himself as Target security, and asked defendant to come back inside the store. Defendant pushed Parmar's hand away and "immediately tried to get away." Ruvalcaba joined Parmar and each tried to grab one of defendant's arms. Defendant attempted to get out of their grasp, and appeared to be trying to bite Ruvalcaba. Parmar placed defendant in a chokehold, and all three men fell to the ground.

Defendant hit Ruvalcaba several times in the face while Parmar repeatedly told defendant to let go of Ruvalcaba. After Parmar pulled defendant off Ruvalcaba, the security officers decided to abandon their efforts to apprehend him in the interests of their safety and the safety of the store's customers. Defendant ran toward the parking lot, telling Parmar and Ruvalcaba to "back the f--k off." Ruvalcaba suffered a cut to his ear during the incident and Parmar suffered an abrasion to his knee.

Another Target security employee retrieved a pair of sunglasses and a baseball hat defendant had lost at the scene and provided them to the police. DNA collected from the sunglasses was compared to defendant's known DNA. Defendant could not be excluded as a possible major contributor to the DNA on the sunglasses. The probability that the samples belonged to different individuals was one in 20 billion.

In a previous incident in December 2012, defendant was stopped as he left a Walmart store in Santa Ana, California with four decks of playing cards in the waistband of his pants. A brief struggle ensued.

Defendant was charged with two counts of second-degree robbery. (Pen. Code, §§ 211, 212, subd. (c).) The information alleged that defendant had suffered a prison prior. (*Id.*, § 667.5, subd. (b).) A jury found defendant guilty of both counts, and in a bifurcated proceeding the trial court found true the prison prior allegation. The trial court struck the prison prior and sentenced defendant to three years in prison: the midterm of three years on count 1, and a concurrent three-year term on count 2.¹ The court also imposed fees and fines. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant raises a single issue on appeal: Whether the trial court erred by failing to instruct the jury with defendant's proposed pinpoint instructions. We review the propriety of the jury instructions de novo, and view a challenged instruction in the context of the jury's full charge. (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1013.) "A trial court must instruct the jury on general principles of law necessary for the jury's understanding of the case. Defendants have a right to an instruction pinpointing their defense theory, but the court may refuse incorrect, argumentative, duplicative, or confusing instructions." (*People v. Ramirez* (2019) 40 Cal.App.5th 305, 307; see *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 499; *People v. Hovarter* (2008) 44 Cal.4th 983, 1021.)

The trial court instructed the jury regarding robbery with CALCRIM No. 1600, as follows:

¹ The court denied probation and denied a referral to a substance abuse program because defendant had been through five previous substance abuse treatment programs and had not made any progress.

“To prove that the defendant is guilty of this crime, the People must prove one, that the defendant took property that was not his own; two, the property was in possession of another person; three, the property was taken from the other person or his immediate presence; four, the property was taken against that person’s will; five, the defendant used such force or fear to take property or to prevent the person from resisting; and six, when the defendant used force or fear, he intended to deprive the owner of the property permanently. The defendant’s intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery. . . . A person takes something when he or she gains possession of it and moves it some distance. The distance . . . [m]oved may be short.”

Defendant requested two pinpoint instructions, both of which the trial court refused:

1. “If a defendant does not harbor the intent to take property from the possessor at the time he applies force or fear, the taking is only a theft, not a robbery.”
2. “If defendant had abandoned property prior to struggle with victim, he is guilty of theft, rather than attempted robbery or robbery.”

The trial court properly decided that the proposed special instructions were duplicative of the standard jury instruction, CALCRIM No. 1600, or were not correct statements of law. (*People v. Cash* (2002) 28 Cal.4th 703, 736 [defendant’s proposed pinpoint instruction “redundantly instructed on when defendant must form an intent to rob”].) CALCRIM No. 1600 makes clear that the intent to deprive the possessor of property must be formed before or during the time force or fear was used.

The cases defendant cites to support pinpoint instruction No. 1 are not on point. In *People v. Davis* (2005) 36 Cal.4th 510, 560, the California Supreme Court did not consider whether the trial court erred by failing to give an instruction similar to pinpoint instruction No. 1 because it found the court erred in failing to give a unanimity

instruction, and there were two potential robberies of a single victim, to which the defendant had two separate defenses. (*Id.* at pp. 560-562.) In *People v. Burney* (2009) 47 Cal.4th 203, 253 to 255, the California Supreme Court affirmed the defendant's conviction for robbery, despite the defendant's contention that he did not have the specific intent to permanently deprive the victim of his property at the time the property was taken. In both cases, the court cited the general language proposed by defendant in pinpoint instruction No. 1, but neither considered whether that language was required in a special instruction, as opposed to the standard instruction.

Defendant cites *People v. Pham* (1993) 15 Cal.App.4th 61 in support of his argument that the trial court should have given his proposed pinpoint instruction No. 2. In *People v. Pham*, the victim saw the defendant taking items from the victim's car. (*Id.* at p. 64.) As the victim chased him, the defendant dropped the bag containing the victim's property and began hitting and struggling with the victim and the victim's friend. (*Ibid.*) The defendant was convicted of two counts of robbery. (*Id.* at p. 63.) On appeal, the defendant argued that the trial court erred by failing to give a pinpoint instruction on attempted robbery, on the theory that he was unsuccessful in his use of force or fear to complete a taking of the property. (*Id.* at p. 67.) The appellate court rejected the defendant's argument because the robbery was complete when he removed the property from the victim's car and began to run away. (*Id.* at pp. 67-68.)

The appellate court held: "If the prosecution's evidence was believed, it would not support an offense less than robbery. Defendant's conduct was either a robbery committed by the use of 'force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence . . . '[citation], or it was simply an assault or a battery. If defendant truly abandoned the victims' property before using force, then, of course he could be guilty of theft, but not of

an *Estes*-type^[2] robbery. Indeed, in the situation where property is taken without the use of force or the threat thereof and thereafter such force or threat is employed to prevent the owner from recovering the property or to facilitate an escape, the offense committed simply could not be an attempted robbery. Thus, defendant was not entitled to an instruction on attempted robbery since such a theory was contrary to the evidence. “The fact that a jury can exercise a naked power to convict the defendant of an included offense not supported by the evidence does not entitle the defendant to an instruction thereon.”” (*People v. Pham, supra*, 15 Cal.App.4th at p. 68.)

Here, too, the prosecution’s evidence would not have supported a conviction of a lesser included offense. Defendant’s theory of the case was that he did not have possession of the golf balls when he exited the store, meaning that there was neither a robbery nor a theft. The only crime under defendant’s theory of the case was assault and battery, and defendant did not propose a pinpoint instruction regarding that crime.

Defendant also cites *People v. Hodges* (2013) 213 Cal.App.4th 531, 537, in which the trial court refused a pinpoint instruction similar to the one requested by defendant in this case. In *People v. Hodges*, the defendant, observed by store security officers, took items from a grocery store and left without paying for them. (*Id.* at p. 535.) When the security officers stopped the defendant at his car and asked him to return to the store, the defendant threw the items at one of the officers, and drove away, striking one of the officers with his car in the process. (*Id.* at p. 536.) In addition to refusing the requested pinpoint instruction, the trial court provided a misleading response to a jury question regarding the timing of the theft versus the use of force or fear. (*Id.* at p. 539.) The appellate court’s analysis of the pinpoint instruction is not included in the published portion of the opinion.

² *People v. Estes* (1983) 147 Cal.App.3d 23.

Further, CALCRIM No. 1600 makes clear that the property must be taken in order for a robbery to occur. Therefore, special instruction No. 2 was duplicative of the standard instruction.

Even if the trial court erred by refusing defendant's special instruction Nos. 1 and 2, we would conclude the error was harmless. Defendant was able to argue his theory of the case based on the instructions given to the jury, and, indeed, the prosecutor addressed that defense in closing arguments.

The evidence of defendant's guilt was significant. Ruvalcaba, whose job was to protect Target property from shoplifters, saw defendant put the golf balls in the waistband of his pants. The Target surveillance video footage, trial exhibit No. 3, shows (1) defendant picks up a small, white, rectangular object in his left hand; (2) defendant places the object into or under the pocket of his hoody sweatshirt; (3) defendant walks through the store with his left hand in the hoody pocket; (4) defendant walks past the checkout counters without paying for any items; (5) as he exits the store, defendant is stopped by Ruvalcaba and Parmar, and physically resists them; (6) as defendant struggles with the security officers, a small, white, rectangular object falls from his sweatshirt. No evidence supported defendant's argument that he discarded the golf balls before exiting the store.

There is no reasonable probability that defendant would have achieved a different outcome if the trial court had instructed the jury with the proposed pinpoint instructions. (*People v. Earp* (1999) 20 Cal.4th 826, 886-887 [refusal to give pinpoint instruction review under harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818].)³ Therefore, we affirm.

³ Defendant argues that we should review the prejudice of any alleged error under the standard of *Chapman v. California* (1967) 386 U.S. 18. An instructional error that "relieves the prosecution of the burden of proving beyond a reasonable doubt each essential element of the charged offense, or that improperly describes or omits an element of an offense" requires *Chapman v. California* harmless error review. (*People v. Larsen*

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.

(2012) 205 Cal.App.4th 810, 829.) Because pinpoint instructions merely relate particular facts to legal issues in the case, the failure to give a pinpoint instruction is reviewed for prejudice under the *People v. Watson* harmless error standard. (*People v. Larsen, supra*, at p. 830.)